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## Contracts

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## CONTRACTS

### I. MEASURE OF ACTUAL DAMAGES FOR CROP FAILURE IN ACTION FOR BREACH OF HERBICIDE WARRANTY

In *Hill v. BASF Wyandotte Corp.*<sup>1</sup> the South Carolina Supreme Court defined the measure of actual damages for the breach of a herbicide warranty<sup>2</sup> as the value the crop would have had if the product had conformed to the warranty less the value of the crop actually produced and the expense of preparing for market the portion of the crop prevented from maturing.<sup>3</sup> Although the court had previously used this measure of damages in crop failure cases, this measure was never said to reflect *actual* damages.<sup>4</sup> Thus, the case blurred previous distinctions between actual and consequential damages<sup>5</sup> and rendered useless otherwise valid contractual limitations of damages.<sup>6</sup>

As acknowledged by the supreme court,<sup>7</sup> the measure of

1. 280 S.C. 174, 311 S.E.2d 734 (1984).

2. Plaintiff Hill, a farmer, purchased and used the herbicide Basalin on 1,450 acres of soybeans. Basalin is manufactured by defendant BASF Wyandotte Corporation (BWC). Hill used another herbicide, Treflan, on 200 acres and alleged that the Treflan treated crops were better in yield and quality than the Basalin treated crops. Hill sued BWC in United States District Court for breach of oral and written warranties and was awarded \$207,725.00. The Fourth Circuit Court of Appeals reversed and remanded, holding that only the written warranties on the labels of the product applied and that the limitation of warranties on each can of Basalin was valid. The limitation stated that "[i]n no case shall 'BWC' or the Seller be liable for consequential, special or indirect damages resulting from the use or handling of this product." *Id.* at 176, 311 S.E.2d at 735. The Fourth Circuit specifically left open the question of how to measure the actual damages in the case. *Hill v. BASF Wyandotte Corp.*, 696 F.2d 287, 292 n.6 (4th Cir. 1982). On remand the district court certified the question to the South Carolina Supreme Court pursuant to S.C. SUP. CT. R. 46 (Supp. 1984).

3. *Id.* at 179, 311 S.E.2d at 736.

4. *See, e.g., Simmons v. Ciba-Geigy Corp.*, 279 S.C. 26, 302 S.E.2d 17 (1983); *W.R. Grace and Co. v. LaMunion*, 245 S.C. 1, 138 S.E.2d 337 (1964); *Amerson v. F.C.X. Co-Op Service*, 227 S.C. 520, 88 S.E.2d 605 (1955); *McCown-Clarke Co. v. Muldrow*, 116 S.C. 54, 106 S.E. 771 (1921).

5. *See D. DOBBS, REMEDIES* § 12.1 (1973) (referring to crop loss as a special or consequential damage); *see also John P. Hollingsworth on Wheels, Inc. v. Arkon Corp.*, 279 S.C. 183, 305 S.E.2d 71 (1983) (lost profits are well recognized as consequential damages).

6. In *Hill* the defendant had a valid contractual limitation of damages incorporated into its product label. *See supra* note 2.

7. 280 S.C. at 176, 311 S.E.2d at 735.

damages for a breach of warranty is ordinarily controlled by section 36-2-714(2) of the South Carolina Code,<sup>8</sup> which provides that “[t]he measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special circumstances show proximate damages of a different amount.”<sup>9</sup> The court noted, however, that the above formula is most appropriate where the non-conforming goods can be repaired or replaced and value can be defined with certainty.<sup>10</sup>

The court found that defective herbicides are different from the usual nonconforming goods. “The value of a herbicide as warranted is difficult to define. Price and value are not equivalents. From the farmer’s perspective, the value of the herbicide is a healthy crop at maturity. In the manufacturer’s viewpoint, the value is its selling price.”<sup>11</sup> The court concluded that this inability to determine the value of goods as warranted and accepted created a “special circumstance” within the meaning of section 36-2-714(2), thus justifying “proximate damages of a different amount.”<sup>12</sup>

One author has suggested that the “special circumstances” exception to the general measure of actual warranty damages is appropriate when “the buyer at the time of entering into the contract communicated to the seller sufficient facts to make it apparent that the damages subsequently claimed were within the reasonable contemplation of the parties.”<sup>13</sup> Such circumstances also suggest “a proper case”<sup>14</sup> for recovery of consequential damages in addition to the standard measure of actual damages.<sup>15</sup> The defendant in *Hill* undoubtedly knew that all buyers of its herbicide, Basalin, would apply it to their crops, and if the Basalin was ineffective, the crops would suffer. The defendant, however, imposed a valid contractual limitation of

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8. S.C. CODE ANN. § 36-2-714(2)(1976).

9. *Id.*

10. 280 S.C. at 177, 311 S.E.2d at 735-36.

11. *Id.*, 311 S.E.2d at 736.

12. S.C. CODE ANN. § 36-2-714(2)(1976).

13. R. ANDERSON, UNIFORM COMMERCIAL CODE § 2-714:22 (3rd ed. 1983).

14. See S.C. CODE ANN. § 36-2-714(3)(1976).

15. See S.C. CODE ANN. § 36-2-715(2)(a)(1976).

consequential damages on the buyers of Basalin.<sup>16</sup>

Section 36-2-714(1) of the South Carolina Code<sup>17</sup> allows a buyer of nonconforming goods to recover as damages "the loss resulting in the ordinary course of events from the seller's breach as *determined in any manner which is reasonable.*"<sup>18</sup> Thus, the court in *Hill* felt free to apply its traditional measure of damages in crop failure cases.<sup>19</sup> By labeling this measure of damages "actual,"<sup>20</sup> the court rendered the herbicide manufacturer's valid contractual limitation of damages useless.

The supreme court could have arrived at the same measure of damages under section 36-2-714(2), without resorting to the "special circumstances" exception, if it had been able to find that the value of the goods accepted was a season of poor weed control and the value of the goods as warranted was a season of proper weed control.<sup>21</sup> Regardless of the statutory basis on which it relied, the court's fair result is troubling because it fails to fully recognize the statutory distinction between actual and consequential damages. Lost profits, included in the *Hill* court's definition of actual damages, are generally considered consequential damages.<sup>22</sup> The supreme court dismissed this general characterization of lost profits as "merely coincidental" by classifying the crop failure as a *direct loss*.<sup>23</sup>

In *Hill* the court expressly gives notice that the measure of *actual* damages "in cases similar to this" will be the lost crop

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16. See *supra* note 6.

17. S.C. CODE ANN. § 36-2-714(1)(1976).

18. *Id.* (emphasis added).

19. In *Kleven v. Geigy Agricultural Chemicals*, 227 N.W.2d 566 (Minn. 1975), a case factually similar to *Hill*, the court held that damages for lost crop value were consequential damages for which the manufacturer was not liable under its valid limitation of remedies clause. A prior Minnesota case, however, had expressly held that the recovery for lost crops is consequential damages. *Frohreich v. Gammon*, 28 Minn. 476, 11 N.W. 88 (1881). In contrast, the South Carolina Supreme Court has consistently awarded damages under the formula adopted in *Hill* without explicitly labeling the damages as direct or consequential. See *supra* note 4 and accompanying text. Thus, in *Hill* the court was free to declare that lost crop value due to herbicide failure is direct, actual damages.

20. 280 S.C. at 177, 311 S.E.2d at 736.

21. J. WHITE & S. SUMMERS, UNIFORM COMMERCIAL CODE § 10-2 n.5 (2d ed. 1980) (pointing out that the value differential formula in U.C.C. § 2-714(2) is the same as the precode formula).

22. See *supra* note 5.

23. 280 S.C. at 178, 311 S.E.2d at 736.

value formulated above.<sup>24</sup> Thus, South Carolina practitioners seeking to circumvent contractual limitations on warranty remedies should draw analogies to *Hill* and plead "special circumstances." South Carolina sellers and manufacturers, on the other hand, should revise their contractual language and warranty labels to expressly limit the remedies for breach to replacement of the product itself or refund of the sales price.

*Elizabeth W. Settle*

## II. RESTATEMENT RULE OF MATERIAL CONTRIBUTION TO NONOCCURENCE OF CONDITION PRECEDENT ADOPTED

In *Champion v. Whaley*<sup>25</sup> the South Carolina Court of Appeals adopted the Restatement rule under which a plaintiff is required only to present evidence that the defendant materially contributed to the nonoccurrence of a condition precedent.<sup>26</sup> The court abrogated the older test requiring a plaintiff to show that the condition would have occurred "but for" the defendant's lack of cooperation.<sup>27</sup>

In August 1979 Whaley and Edwards, the sellers, signed an exclusive agreement<sup>28</sup> with Champion, a realtor, to sell a house. Under the agreement, Champion would list the house for 120 days and would receive a six percent sales commission "if [the] property [were] sold, conveyed or otherwise transferred within 90 days after the termination of this authority . . . to anyone with whom agent has had negotiations . . ." <sup>29</sup> Champion found

24. *Id.* at 177, 311 S.E.2d at 736.

25. 280 S.C. 116, 311 S.E.2d 404 (Ct. App. 1984).

26. RESTATEMENT (SECOND) OF CONTRACTS § 245 (1981).

27. 280 S.C. at 122, 311 S.E.2d at 407.

28. Both plaintiff and defendants classified the listing as an "exclusive right to sell agreement." Brief of Appellant at 2, Brief of Respondent at 2. The court of appeals referred to the listing as an exclusive agency contract, 280 S.C. 118, 311 S.E.2d at 405, but apparently meant an "exclusive right to sell." An exclusive agency agreement prohibits the owner from selling the property through another broker's agency, but he may still sell the property through his own efforts. An exclusive right to sell agreement (exclusive sales contract) prohibits the owner from selling the property either through another broker or personally. Any breach by the seller results in the broker's right to sue for the commission. *Carlsen v. Zane*, 261 Cal. App. 2d 399, 401-02, 67 Cal. Rptr. 747, 749 (1968).

29. 280 S.C. at 119, 311 S.E.2d at 406. This contract provision established a condition precedent that the property be "sold" before the obligation to pay the commission arose. *Id.*

a buyer, Joyce Bell, who signed a contract with the sellers in December 1979. Performance under the contract of sale was conditioned on Bell's obtaining a 100% loan from Farmers Home Administration (FmHA). On the same day Champion and the sellers executed an agreement extending the period of exclusive agency to April 27, 1980. On March 12, 1981, however, Champion learned that Whaley had sold the house to another buyer, Cauthen,<sup>30</sup> and insisted that the contract with Bell be honored. Several days later a broker of the local Century 21 office and a FmHA administrator visited the home to appraise it, but were unable to do so because Cauthen had changed the locks. Since the property had not been appraised, FmHA could not finalize the loan to Bell, and the sale was not consummated.<sup>31</sup>

The trial judge granted a nonsuit, holding that the evidence did not establish that the negotiations between Bell and the sellers had been completed.<sup>32</sup> The court of appeals, however, reversed the trial court and remanded for a new trial. The court found that Champion's testimony presented sufficient evidence that Whaley had "substantially contributed" to the prevention of the contract condition to justify submission of the issue to the jury.<sup>33</sup>

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30. 280 S.C. at 118, 311 S.E.2d at 405. Up until two weeks before the trial, title to the property was vested in the sellers. Cauthen was paying the mortgage, however, and had made substantial improvements (valued at \$2,000.00) on the home. Cauthen testified that he had recently acquired the property in a handshake deal without the deed passing. Record at 69-73.

31. *Id.* at 118-19, 311 S.E.2d at 405. Testimony was established at the trial court that on March 12 Champion had given Whaley a letter from FmHA to Ms. Joyce Bell which stated that it might be nine months before the funds from FmHA were available. Record at 37. The sellers relied on this letter to maintain that the sale to Bell would not have closed on April 6 as required in the contract.

32. *Id.* at 119, 311 S.E.2d at 40. Relying on *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 232 S.E.2d 728 (1977), the trial judge required that Champion prove the existence of a valid and enforceable contract between Whaley and himself before any action for the recovery of a commission could be brought. Record at 92. Finding little evidence to prove Bell could have closed her loan within the contract period, the trial judge held that negotiations between the buyer and seller were never complete and, therefore, granted a nonsuit. Record at 95.

33. 280 S.C. at 122, 311 S.E.2d at 407. The court noted that under South Carolina law "a broker has earned his commission when he procures a purchaser who is accepted by the owner of the property and with whom the latter enters into a valid and enforceable contract. *Id.* at 119, 311 S.E.2d at 406 (citing *Dantzler Real Estate, Inc. v. Boland*, 276 S.C. 275, 277 S.E.2d 705 (1981); *Thomas-McCain, Inc. v. Siter*, 268 S.C. 193, 232 S.E.2d 728 (1977)). This right to a commission may be contingent upon the occurrence of conditions such as consummation of the sale or delivery of a title free of encumbrances

A plaintiff suing on a conditional contract must prove that all conditions precedent to his right of performance have occurred.<sup>34</sup> A defendant cannot, however, prevent a condition of a contract and then rely on the plaintiff's resulting nonperformance in an action on the contract.<sup>35</sup> Since Champion presented evidence that Bell was ready, able, and willing to consummate the sale, the jury could have inferred that Bell's obligation to purchase was unconditional<sup>36</sup> and that this satisfied the condition in the exclusive sales listing so that Whaley's obligation to pay Champion's commission was unconditional. There was also evidence that the sellers had sold the property to Cauthen, in repudiation of their contract with Bell. As the court of appeals observed, "Where a party's repudiation contributes materially to the nonoccurrence of a condition precedent to his duty of performance, the nonoccurrence of the condition is excused."<sup>37</sup> Evi-

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or liens. If any condition established by the parties "is made a condition precedent to the owner's obligation to pay the commission, the broker assumes the risk of the purchaser's nonperformance." 280 S.C. at 119, 311 S.E.2d at 406. In the instant case, the risk of the purchaser's nonperformance was on Champion until the time when the sellers had an unconditional right under a valid contract of sale to demand performance from a purchaser procured by Champion. 280 S.C. at 119, 311 S.E.2d at 406. See *Dantzler*, 276 S.C. at 275, 277 S.E.2d 705 (1981).

34. 280 S.C. at 120, 311 S.E.2d at 406. Section 15-13-730 of the South Carolina Code states:

In pleading the performance of conditions precedent in a contract it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part. If such allegations be contended the party pleading shall be bound to establish at the trial the facts showing such performance.

S.C. CODE ANN. § 15-13-730 (1976). See *Griffith v. Newell*, 69 S.C. 300, 48 S.E. 259 (1904) (plaintiff was not able to recover on a contract because he did not allege performance of all conditions precedent on his part). Thus, any broker suing for his commission must prove that all conditions precedent to the seller's duty to pay have been fulfilled.

35. 280 S.C. at 120, 311 S.E.2d at 406. See *Farrow v. Martin*, 16 S.C.L. (Harp.) 409 (1824) (buyer not able to recover for breach of contract in the sale of land because he did not meet at the prescribed location pursuant to the contract in order to purchase and transfer title).

36. 280 S.C. at 120, 311 S.E.2d at 406. The court noted that Century 21 had performed a credit check on Bell and determined she was qualified for the loan. FmHA allocates money on a quarterly basis and a loan can normally be closed out within 120 days. A representative of Century 21 testified that no reason existed why the loan would not have closed before the contract expiration.

37. *Id.* at 121, 311 S.E.2d at 407. RESTATEMENT (SECOND) OF CONTRACTS § 255 comment a (1981) states: "No one should be required to do a useless act, and if because of a party's repudiation, it appears that the occurrence of a condition of duty would not be followed by performance of the duty, the nonoccurrence of the condition is generally

dence of Whaley's sale or rental to Cauthen supported the claim that the seller's conduct kept the property from being sold to Bell and thus caused the failure of the condition in the exclusive listing agreement with Champion.<sup>38</sup>

The court of appeals rejected the sellers' contentions that the sale would not have closed by the required date in the contract<sup>39</sup> and that Champion had failed to prove Cauthen's conduct prevented Bell from obtaining the FmHA loan.<sup>40</sup> Although Champion did have to prove the condition could have occurred if the sellers had not prevented it,<sup>41</sup> he did not have to show that the loan would have closed "but for" the prevention of the condition.<sup>42</sup> Following *Shear v. National Rifle Association of America*,<sup>43</sup> the court adopted the rule in comment b to section

excused." If the nonoccurrence were excused, then the sellers would be obligated to pay Champion's commission. See RESTATEMENT (SECOND) OF AGENCY § 445 comment e (1958) ("a principal is subject to liability if the broker procures a customer having sufficient assets, ready and willing to enter into an enforceable contract with the principal on the principal's terms . . .").

38. 280 S.C. at 120, 311 S.E.2d at 406-07. Cauthen's presence on the premises, combined with his statements to the FmHA administrator, may have hindered Bell's attempts to obtain FmHA financing.

39. See *supra* notes 32 & 37.

40. 280 S.C. at 120, 311 S.E.2d at 407.

41. *Id.* at 121, 311 S.E.2d at 407. See *Record Realty, Inc. v. Hull*, 15 Wash. App. 826, 552 P.2d 191 (1976) (defendant seller was estopped from asserting nonoccurrence of conditions precedent, but plaintiff broker had burden of proving he had fulfilled all conditions precedent).

42. 280 S.C. at 122, 311 S.E.2d at 407. The "but for" test was included in the RESTATEMENT OF CONTRACTS § 295 (1932). For a discussion of this test, see 3A A. CORBIN, CONTRACTS § 269 n.2 (1960).

43. 606 F.2d 1251 (D.C. Cir. 1979). The United States Court of Appeals in *Shear* probably only had the use of the RESTATEMENT (SECOND) OF CONTRACTS § 269 (Tentative Draft 1973), which uses the phrase "substantially contribute." The final draft replaced "substantially contribute" with "contributed materially." Comment b now reads:

Although it is implicit in the rule that the condition has not occurred, it is not necessary to show that it would have occurred *but for* the lack of cooperation. It is only required that the breach have *contributed materially* to the nonoccurrence. Nevertheless, if it can be shown that the condition would not have occurred regardless of the lack of cooperation, the failure of performance did not *contribute materially* to its nonoccurrence and the rule does not apply.

The burden of showing this is properly thrown on the party in breach.

RESTATEMENT (SECOND) OF CONTRACTS § 245 comment b (1981). The Restatement drafters gave no reason for the change, but the new wording seems to make little, if any, difference. Courts have viewed the terms "substantial" and "material" as virtually synonymous. See, e.g., *Lewandoski v. Finkel*, 129 Conn. 526, 29 A.2d 762 (1942); *Earle v. Porter*, 112 Ind. App. 71, 40 N.E.2d 381 (1942); *Grand Rapids Hydraulic Co. v. American Fire Ins. Co.*, 93 Mich. 396, 53 N.W. 538 (1892); *State v. Bowers*, 226 N.C. 601, 39 S.E.2d



245 of the Second Restatement of Contracts. This comment states: "Although it is implicit in the rule that the condition has not occurred, it is not necessary to show that it would have occurred but for the lack of cooperation. It is only required that the breach have contributed materially to the nonoccurrence."<sup>44</sup>

Under the older "but for" test, a defendant could often, as here, assert that a complaint of prevention of a condition was speculative and the condition might not have been performed even if the defendant had not hindered its performance. The Second Restatement recognized this problem and rectified it. The court of appeals properly adopted this new rule.

*Richard K. Warther*

### III. DOCTRINE OF MERGER EXTENDED TO MORTGAGES

In *Wilson v. Landstrom*<sup>45</sup> the South Carolina Court of Appeals held that the doctrine of merger applies not only to deeds containing terms different from those of a prior contract to sell, but also to mortgages containing terms different from those in the contract.<sup>46</sup> This decision is an important consideration in contract negotiations.

The appellant, Mary Ann Landstrom, living in California, executed a power of attorney authorizing Harry S. Dent, an attorney, to sell her house in Columbia. Dent subsequently signed a contract to sell to Chester Street Associates, the respondent. The contract contained a handwritten addition, which read: "Seller agrees to accept second mortgage . . ."<sup>47</sup> On the closing date, Dent delivered the deed, and Chester Street Associates delivered a second mortgage, which contained the following provision: "This is a second mortgage and shall be subject and subordinate to any first mortgage that Mortgagor may now have or subsequently execute."<sup>48</sup>

Upon receiving the closing papers, Mrs. Landstrom consulted an attorney in California who advised her that the clause

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740 (1946).

44. RESTATEMENT (SECOND) OF CONTRACTS § 245 comment b (1981).

45. 281 S.C. 260, 315 S.E.2d 130 (Ct. App. 1984).

46. *Id.* at 264, 315 S.E.2d at 132-33.

47. *Id.* at 263, 315 S.E.2d at 132.

48. *Id.*

on the mortgage meant that "the mortgage might be subordinated to a future mortgage placed on the property."<sup>49</sup> In an effort to invalidate the conveyance, Mrs. Landstrom refused to have the power of attorney probated.<sup>50</sup> Chester Street Associates filed suit to confirm their title to the property. Mrs. Landstrom appealed from the circuit court's confirmation of title in Chester Street Associates.<sup>51</sup> The court of appeals affirmed.<sup>52</sup>

In affirming the lower court's decision, the court of appeals extended the doctrine of merger in real estate transactions involving a contract to sell so that the doctrine applies not only to deeds containing terms different from the contract, but also to mortgages containing terms different from the contract.<sup>53</sup> The court cited *Charleston & Western Carolina Railway Co. v. Joyce*<sup>54</sup> as authority in reaching this conclusion. Because *Joyce*, however, was limited to deeds, the court, citing out-of-state authority,<sup>55</sup> held that "[t]he same rule applies to mortgages."<sup>56</sup>

Thus, the practitioner should be aware that the doctrine of merger will be applied both to the terms of a deed and to the terms of a mortgage. As a result, mortgagees, as well as holders of deeds, will share the same security in knowing that the terms contained in the final instrument are controlling. This holding broadens meaningful postcontract negotiations since both parties can be sure that the terms will be given binding effect when

49. *Id.*

50. *Id.* When the power of attorney was given, it was witnessed, but not properly probated.

51. *Id.*

52. *Id.* at 267, 315 S.E.2d at 134.

53. *Id.* at 264, 315 S.E.2d at 133. No other South Carolina case directly states that the doctrine of merger applies to a mortgage.

54. 231 S.C. 493, 99 S.E.2d 187 (1957). The supreme court held that the language of a deed controlled the language in an option to purchase, stating the general rule that "[a] deed executed subsequent to the making of an executory contract for the sale of land supersedes that contract . . ." *Id.* at 505, 99 S.E.2d at 193 (quoting 55 AM. JUR. *Vendor and Purchaser* § 327 (1946)).

55. *Jordan v. Flynt*, 240 Ga. 359, 240 S.E.2d 858 (1977); *Timms v. Shannon*, 19 Md. 296 (1962); *Norment v. Turley*, 24 N.M. 526, 174 P. 999 (1918).

56. 281 S.C. at 264, 315 S.E.2d at 133.

incorporated in the body of the mortgage.

*William Thomas Causby*

#### IV. NO ELECTION REQUIRED BETWEEN QUANTUM MERUIT AND BREACH OF EXPRESS CONTRACT

In *Robert Harmon and Bore, Inc. v. Jenkins*<sup>57</sup> the South Carolina Court of Appeals held that a party can plead both *quantum meruit* and breach of contract in a single action without electing a remedy.<sup>58</sup>

This action arose when the defendant, Leroy Jenkins, failed to comply with the terms of an alleged oral contract to lease property to the plaintiff. The plaintiff brought suit, pleading two causes of action: recovery under *quantum meruit* for the reasonable value of services he performed in preparing the property; and damages for the defendant's breach of the alleged oral contract to lease the property. The defendant's answer denied liability and asserted the statute of frauds as a defense to the express contract cause of action. After the trial judge required the plaintiff to elect between the causes of action for *quantum meruit* and breach of express contract, the plaintiff elected to pursue the express contract claim. The trial court held that defendant's answer constituted a memorandum sufficient to satisfy the statute of frauds, and a jury awarded the plaintiff \$25,000 in damages.<sup>59</sup>

The court of appeals determined that the defendant's answer did not remove the contract from the statute of frauds,<sup>60</sup> but also held that the plaintiff should not have been forced to elect between the two causes of action.<sup>61</sup> The court reasoned

57. 282 S.C. 189, 318 S.E.2d 371 (Ct. App. 1984).

58. The court also held that a parol contract to lease property was not removed from the statute of frauds by the defendant's acknowledgement of certain terms of the agreement. *Id.* at 194-95, 318 S.E.2d at 374. The defendant's answer admitted the existence of previous discussions "relative to the possibility of [the] premises being leased to . . . Harmon" and provided specifics of the "proposed lease," but specified that "the terms of the contemplated lease were never fully agreed upon" and that the lease was "to be reduced to a formal written agreement." The lease was not reduced to writing and the plaintiff never took possession of the premises. *Id.* at 192, 318 S.E.2d at 373.

59. *Id.* at 193, 318 S.E.2d at 373. The defendant's motions for nonsuit, directed verdict, and judgment notwithstanding the verdict were denied.

60. See *supra* note 58.

61. 282 S.C. at 198, 318 S.E.2d at 376.

that the plaintiff's two causes of action, one "in the nature of *assumpsit* upon a *quantum meruit* for the reasonable value of services and the second for breach of contract to lease a building,"<sup>62</sup> were not inconsistent, but were merely "two different causes of action and a right to but a single recovery."<sup>63</sup> The court explained that "[t]he two actions are included because of an obvious uncertainty, in view of the statute of frauds, as to which cause of action Harmon would be able to prove or recover on."<sup>64</sup>

The court was clearly correct in its determination that pleading both *quantum meruit* and express contract in this case was not inconsistent. The *quantum meruit* claim was for the reasonable value of plaintiff's work in *preparation* to lease the property. The contract action was for damages in the amount that was to be the fruit of that work. Thus, a natural relationship existed between the action in *quantum meruit* and express contract.<sup>65</sup> As the court of appeals observed, "An election of remedies involves a choice between different remedies afforded by law for the same injury . . . . The principle has no application where two separate causes of action, each based on different facts, exist."<sup>66</sup> No factual inconsistency existed between the two

62. *Id.* at 197, 318 S.E.2d at 376.

63. *Id.* at 198, 318 S.E.2d at 376.

64. *Id.* The court of appeals cited *Tzowelekas v. Tzowelekas*, 206 S.C. 90, 33 S.E.2d 73 (1945), which concerned the disposition of a tract of land. Legal title to the property was vested in the defendant, the plaintiff's wife. Plaintiff's first cause of action sought to have the property impressed with a trust in favor of him and his children. His second cause of action sought to foreclose the mortgage he held on the property. The wife contended that the plaintiff had to elect a remedy because the two causes of action were inconsistent. The South Carolina Supreme Court held that the principle of election of remedies was inapplicable: "The plaintiff states two separate and distinct causes of action, each based upon a different set of facts—one, that the property be impressed with a trust; the other for foreclosure." *Id.* at 94, 33 S.E.2d at 74. The court explained that "[p]roof in support of the trust set up in the first cause of action would not be contradictory or destructive of proof establishing the mortgage." *Id.* at 95, 33 S.E.2d at 74.

65. *Cf. Walker v. McDonald*, 136 S.C. 231, 134 S.E.222 (1926). In *Walker* the plaintiff asserted two causes of action. The first sought to recover the sum plaintiff had paid defendant for a one-half interest in a partnership. This claim was based on his assertion that the defendant used fraud and deceit to induce the investment. The second cause of action was for the balance due to the plaintiff as his share of net profits of the business. The supreme court held that the plaintiff must elect. The first cause of action tended to deny the existence of the partnership, while the second cause of action affirmed its existence. Thus, the causes of action were inconsistent.

66. 282 S.C. at 197, 318 S.E.2d at 376.

causes of action.

This case instructs the practitioner that when there is uncertainty whether the statute of frauds will preclude a recovery based on breach of contract, the plaintiff will be allowed to request recovery based both on *quantum meruit* and on the contract without being forced to make an election. Thus, the practitioner avoids the awkward and uncertain position of deciding which course to pursue before knowing the court's decision on the statute of frauds issue.

*William Thomas Causby*